92-654

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MARK JOHNSON, et al.,

Petitioners,

v.

RICHARD RAYES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What are the standards by which District Courts are to exercise their discretion in appointing counsel under 28 U.S.C. § 1915(d) and to what degree the exercise of that discretion should be controlled by the appellate court.

2. Whether in § 1983 cases the Circuit Courts should give deference to the District Court decision to not appoint counsel for indigent inmates absent a showing of prejudice.

PARTIES TO THIS ACTION

The parties to this proceeding are the petitioners, Mark Johnson, Steven J. Simons, Melvin Rouf, Angelo S. Vinci, William Fairbanks, Dan Danaher, and the respondent, Richard Rayes.

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Petition For Writ Of Certiorari
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PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 969 F.2d 700 (1992) and is attached hereto as Appendix A. The District Court's judgment in accordance with jury verdict is attached as Appendix B.

JURISDICTION

The judgment of the Eighth Circuit reversing the decision of the United States District Court for the District of Nebraska and remanding the case for appointment of counsel and new trial was entered on July 15, 1992. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the Constitution of the United States provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

3. 28 U.S.C. § 1915(d) provides that:

> The court may request an attorney to represent any such person [proceeding *in forma pauperis*] unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

STATEMENT OF THE CASE

Richard Rayes, an inmate at the Nebraska State Penitentiary, filed this action *pro se* in the United States District Court for the District of Nebraska on February 12, 1987. A magistrate judge initially held that the Complaint did not allege facts with sufficient particularity "to give rise to an inference of anything other than negligence" which would support an action under § 1983 or the Eighth Amendment. The magistrate judge granted Mr. Rayes leave to file an Amended Complaint. Mr. Rayes filed a second pleading in which he stated that the defendants were aware of their action. The District Court held that the amendment still did not properly state a claim under § 1983 but determined that appointment of an attorney would be helpful to both the plaintiff and the court. The court appointed an attorney to represent Mr. Rayes in his claims.

On June 15, 1987, court appointed counsel filed an Amended Complaint alleging that the named guards intentionally and maliciously slammed the door on Mr. Rayes' left hand, causing him to suffer a broken finger and extreme pain. The Amended Complaint further alleged that Mr. Rayes was denied medical care for his broken finger for two days, and that the named guards confiscated his finger splint on three separate occasions.

The defendants in the action filed a denial of the allegations and the case proceeded through discovery. In October, 1989, court appointed counsel filed a Motion to Withdraw as Mr. Rayes' attorney (Appendix H). Counsel also filed supporting Affidavits stating that differences existed between himself and his client which could not be

resolved. The magistrate judge granted counsel's Motion to Withdraw and gave Mr. Rayes thirty days (later extended to sixty days) to retain counsel or to inform the court that he would proceed without counsel (Appendix G).

In December, 1989, Mr. Rayes filed a Motion for Discovery directed toward his previous counsel. Mr. Rayes also informed the court that he had contacted no less than three attorneys without positive results, and, therefore, he would represent himself (Appendix F). The magistrate judge denied the Motion for Discovery (Appendix E). Mr. Rayes appealed the magistrate judge's decision to the district judge and requested appointment of counsel (Appendix D). The district judge granted Mr. Rayes' motion for discovery of materials held by his previous counsel and summarily denied his request for appointment of substitute counsel (Appendix C).

After receiving numerous continuances, Mr. Rayes proceeded to jury trial, *pro se,* in September, 1990. The jury returned a verdict in favor of the defendants (Appendix B). The District Court denied a subsequent Motion to Set Aside the Verdict filed by Mr. Rayes. Mr. Rayes then filed a Notice of Appeal, and the Eighth Circuit Court of Appeals appointed counsel to represent Mr. Rayes on appeal.

Mr. Rayes' only assignment of error on appeal was that he was improperly denied substitute counsel. He alleged that the District Court abused its discretion, and that the denial violated his Fifth Amendment due process right to a fair trial. The Eighth Circuit Court of Appeals determined that the District Court abused its discretion in

denying Mr. Rayes' request for substitute counsel and reversed and remanded the case with directions to appoint counsel and grant a new trial (Appendix A).

REASON FOR GRANTING THE WRIT

A conflict exists between Circuits on the standards by which District Courts are to exercise their discretion in appointing counsel under 28 U.S.C. § 1915(d) and the degree to which the exercise of that discretion is reviewed by the Circuit Courts. Consequently, whether or not an indigent plaintiff is appointed counsel by the court may depend to a large degree on the circuit in which the plaintiff is residing or incarcerated at the time the appeal is filed.

Federal law provides that any court of the United States may authorize the commencement of a suit without the prepayment of fees. 28 U.S.C. § 1915. The statute further provides that the court may request an attorney to represent any such person unable to employ counsel.

The courts of this country have long held that the appointment of counsel in a civil case is a privilege and not a right. In *Pennsylvania v. Finley,* 481 U.S. 551, 95 L.Ed.2d 539, 107 S.Ct. 1990 (1987), the Supreme Court held that the right to counsel in criminal cases set forth in *Gideon v. Wainwright,* 372 U.S. 335, 91 L.Ed.2d 799, 83 S.Ct. 792 (1963), and earlier cases did not carry over to a discretionary appeal. The Court further ruled that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of meaningful access

required the State to appoint counsel for indigent prisoners seeking state post conviction relief. Subsequently, in *Murray v. Giarratano*, 492 U.S. 1, 106 L.Ed.2d 1, 109 S.Ct. 2765 (1989), the Supreme Court held that there was no right to the appointment of counsel in a discretionary postconviction procedure even in capital cases. This overruled the district court's determination that the state must provide trained legal assistance to death row inmates because of their time constraints and the unusually complex nature of their cases. Further, in *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 104 L.Ed.2d 318, 109 S.Ct. 1814 (1989), the Supreme Court held that attorneys could not be compelled to represent indigent litigants in civil cases under 28 U.S.C. § 1915(d). That case originated as a § 1983 case brought by an indigent inmate.

The instant case involves the appointment of substitute counsel for an indigent inmate in a § 1983 case. Therefore, this discussion will be limited to appointment of counsel for indigent plaintiffs in § 1983 cases. The practice of trial courts throughout the country on the criteria to be applied in determining if counsel should be appointed has varied greatly. This conflict is based on the standards established by the Circuit Courts for the various circuits. Concurrently, the Circuit Courts have also exercised conflicting standards for review of the District Court decision not to appoint counsel for indigent individuals.

Generally, U.S. Courts of Appeals have recognized that appointment of counsel in civil cases is not a constitutional right. As was noted in *Fowler v. Jones*, 899 F.2d 1088 (11th Cir. 1990), the appointment of counsel in a civil

case "is a privilege that is justified only by exceptional circumstances, where the facts and legal issues are so novel and complex as to require the assistance of a trained practitioner." *Id.* at 1096.

The same "exceptional circumstances" standard is applied in the Fifth Circuit, with specific deference to the judicial discretion of the district court judge. *Ulmer v. Chancellor,* 691 F.2d 209, 213 (5th Cir. 1982). The U.S. Courts of Appeals for the Eleventh and Fifth Circuits have also noted that the quality of a plaintiff's written pleadings, the plaintiff's conduct at trial, and a plaintiff's own statements about his experience in assisting other inmates in legal matters may be considered by the District Court when determining whether or not the plaintiff requires the assistance of counsel. *Fowler, supra,* at 1096; *Archie v. Christian,* 812 F.2d 250, 253 (5th Cir. 1987).

The Seventh Circuit has undergone an interesting evolution in its handling of the issue. In *McKeever v. Israel,* 689 F.2d 1315 (7th Cir. 1982), that court found that a District Court had abused its discretion by failing to consider appointment of counsel for an indigent inmate plaintiff in a civil rights action. The Court of Appeals responded by mandating appointment of counsel. In a thorough and persuasive dissenting opinion, Judge Posner noted that the Court had overreacted and usurped the discretion of the District Court. Instead, as Judge Posner suggested, the matter should have been remanded for the District Court to exercise its discretion under appropriate guidelines:

> I believe there should be a presumption against appointing counsel in a prisoner's civil rights

> suit. . . . I am concerned that the panel's decision . . . may be interpreted by the district courts of this circuit as another step on the road toward making appointment of counsel in civil rights cases routine. That is a destination I should not like to reach. There are not enough lawyers in America to satisfy prisoners' demands for counsel; those demands are insatiable.

Id. at 1315.

More recently, Judge Posner wrote for the majority in *Hughes v. Joliet Correctional Center*, 931 F.2d 425 (7th Cir. 1991). The district court judge in *Hughes* had declined to appoint an attorney for the inmate civil rights plaintiff at the time of the defendants' submission of a motion for summary judgment, because the judge had a policy of denying such requests until and unless she determined that an evidentiary hearing was needed. Judge Posner stated:

> [O]ur quarrel with the judge is that she should have considered Hughes's request in light of the particulars of his case rather than simply deny the request in accordance with a general policy.

Id. at 430.

The case was remanded for the district court judge to exercise her discretion in accordance with the appellate court's guidelines – just as Judge Posner would have done in the earlier *McKeever* decision.

Ostensibly, the standard applied in the Eighth Circuit to determine whether or not an indigent inmate should be appointed counsel in a civil rights action is that standard described in *Johnson v. Williams*, 788 F.2d 1319, 1322-23 (8th Cir. 1986):

> Although factual complexity is certainly a relevant factor for a district court to consider in determining an indigent litigant's need for appointment of counsel, it is not the only factor. . . . We believe that in addition to factual complexity, the district court should also consider the ability of an indigent to investigate the facts, . . . the existence of conflicting testimony, . . . the ability of an indigent to present his claim, . . . and the complexity of the legal issues. [Citations omitted].

Johnson, supra, involved an Arkansas inmate who contended that his placement in a quiet cell for eighteen hours on two occasions, without clothing or bedding, constituted a violation of his Eighth Amendment rights. The Eighth Circuit Court of Appeals found that the District Court had abused its discretion by not appointing counsel for inmate Johnson because the facts and law were "complex" and because Johnson behaved in a contemptuous manner at trial. More recently, in *Williams v. White,* 897 F.2d 942 (8th Cir. 1990), the Eighth Circuit ordered the District Court to appoint counsel for the inmate plaintiff simply because the plaintiff's case was not patently frivolous and subject to immediate dismissal. In *Abdullah v. Gunter,* 949 F.2d 1032 (8th Cir. 1991), an indigent inmate filed a § 1983 suit alleging denial of equal protection when prison officials refused to allow him to mail money to a religious group. The district court denied the appointment of counsel stating specifically that the factual and legal issues did not appear sufficiently complex to require appointment of counsel. On appeal, the Eighth Circuit held that plaintiff's case was both legally

and factually complex, and thus the district court abused its discretion in denying appointment of counsel.

In reviewing the decisions of District Courts, the U.S. Circuit Courts of Appeals have generally held that the determination of the District Court to not appoint counsel for indigent inmates should be reviewed for abuse of discretion. In *In re Lane,* 801 F.2d 1040 (8th Cir. 1986), the court stated:

> The decision to appoint counsel in civil cases is committed to the sound discretion of the district court. . . .
>
> We are aware that several of our earlier opinions appear to be in some conflict on this issue. . . .
>
> We think some confusion may have developed from our later citations of *Redfield*. . . . However, we do not believe that these per curiam opinions relying upon *Redfield* do more than simply express in abbreviated fashion the requirement enunciated in *Redfield* that once a prima facie case has been alleged "further inquiry should be made as to need."

Id. at 1043, *citing Nelson v. Redfield Lithograph Printing,* 728 F.2d 1003-1005 (8th Cir. 1984). This demonstrates the conflict and confusion that the Eighth Circuit itself has expressed regarding its review of District Court decisions to not appoint counsel for indigent inmates.

Thus, a conflict exists between the Circuit Courts of Appeals on the standard to be applied to the appointment of counsel for indigent plaintiffs. This conflict is best illustrated by a comparison of the strict standard of "exigent circumstances" enunciated by the Fifth and Eleventh

Circuit Courts in *Ulmer v. Chancellor, supra,* and *Fowler v. Jones, supra,* and the markedly more liberal standard enunciated by the Eighth Circuit of appointment of counsel when the petition is not patently frivolous and subject to dismissal as shown in *Williams v. White, supra,* and, ostensibly, the instant case.

On appeal, the standard used by the Circuit Courts for review of judicial discretion again conflicts. This is illustrated by the Fifth Circuit review of appointment of counsel granting deference to the judicial discretion of the district court, *Ulmer v. Chancellor, supra,* which conflicts with the review of judicial discretion applied by the Eighth Circuit which gives little or no deference to the determination of the trial judge, relying instead on whether the petition states a colorable claim, *Williams v. White, supra,* and the instant case.

The application of these conflicting standards creates disparate treatment of indigent cases. Whether an attorney is appointed to represent an indigent appellant may well depend on the circuit in which the indigent files the suit. An indigent inmate in the Eleventh Circuit may well procede to trial without the assistance of counsel while an identical case and indigent in the Eighth Circuit would have the assistance of counsel from the time of filing the initial complaint. And once having attained the threshold of a colorable claim in order to receive the assistance of appointed counsel, an inmate in the Eighth Circuit may begin to shop for counsel thru dismissal and request for appointment of substitute counsel.

Similarly, members of the bar in the Eighth Circuit will arguably be required to provide more time to pro

bono work because the number of indigents qualifying for assistance will necessarily be greater because of the lower standard for qualification for assistance. While the disparity in hours devoted by attorneys should never compromise justice, a question remains whether attorneys in one circuit should be required to devote their pro bono time to civil cases which if brought in another circuit would not merit their time.

CONCLUSION

The petitioners respectfully request that the Court issue a writ of certiorari to review the record in this case in order to establish standards by which District Courts may exercise their discretion in appointing counsel and substitute counsel under 28 U.S.C. § 1915(d) and the degree to which the exercise of that discretion should be controlled by the appellate courts.

Respectfully submitted,

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1350

Richard Rayes, Plaintiff - Appellant, v. Mark Johnson; Steven J. Simons; Melvin Rouf; Angelo S. Vinci; William Fairbanks; John Doe, Dr.; Dan Danaher, Dr., Defendants - Appellees.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: March 10, 1992

Filed: July 15, 1992

Before JOHN R. GIBSON, Circuit Judge, LAY, Senior Circuit Judge, and LOKEN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Richard Rayes appeals the district court's entry of judgment following a jury verdict in favor of defendants in Rayes' 42 U.S.C. § 1983 (1988) suit, which alleged that Nebraska state prison employees intentionally injured him and intentionally denied him medical care. Rayes challenges the district court's denial of his request for

substitute counsel following the withdrawal of his first attorney before the trial. We hold that the district court abused its discretion in denying substitute counsel, and remand with directions to appoint counsel and grant Rayes a new trial.

Rayes, an inmate in the Nebraska State Penitentiary, alleges that prison guards slammed a steel door on his hand, breaking a finger, that medical personnel later refused to treat him, and that guard confiscated his finger splints on three separate occasions, thereby interfering with his medical treatment and causing him more pain.

Rayes filed a pro se complaint with the district court, alleging that two guards slammed an other door shut on his arms, which were stuck through the food slot of the inner sliding door. A magistrate judge initially held that the complaint did not allege facts with sufficient particularity "to give rise to an inference of anything other than negligence," which would not support an action under section 1983 or the Eighth Amendment. *Rayes v. Johnson*, CV87-L-94, slip op. at 1-2 (D. Neb. Mar. 5, 1987). (magistrate's memorandum and order).

Although holding that Rayes had failed to state a claim upon which relief could be granted, the magistrate judge granted Rayes the opportunity to file an amended complaint that would more clearly state the nature of his claims. *Id.* at 2. Rayes filed a second pleading in which he stated that the defendants were "aware of thier [sic] action." The district court held that the amendment still did not properly state a claim under section 1983, but determined that appointment of an attorney would be helpful to both the plaintiff and the court, and appointed

S. Nicholas Boggy of Fremont, Nebraska, to represent Rayes. *Rayes v. Johnson*, CV87-L-94, slip op. at 1-2 (D. Neb. May 11, 1987).

Boggy soon filed an amended complaint alleging that the guards "intentional[ly] and malicious[ly]" slammed the door on Rayes' left hand, causing him to suffer a broken finger and extreme pain. The amended complaint also alleged that Rayes was denied medical care for his broken finger for two days, and that guards confiscated Rayes' splint on three separate occasions. The amended complaint requested compensatory and punitive damages and attorney's fees.

The defendants denied the allegations and the case proceeded through discovery. In October 1989, Boggy filed a motion to withdraw as Rayes' attorney. He also filed a supporting affidavit which stated that Rayes' and his differences about the case "cannot be resolved" and that the differences were such that "Mr. Rayes has no confidence in [Boggy] and the manner in which the case is being handled and the attorney-client relationship has deteriorated to the point where [Boggy's] withdrawal . . . is proper and necessary." The affidavit did not state reasons for the differences between Boggy and Rayes because Boggy did not wish those reasons to be "construed in such a manner as to prejudice Mr. Rayes' case."

The magistrate judge granted Boggy's motion to withdraw and gave Rayes 30 days, which he later extended to 60, to retain an attorney or to inform the court that he would proceed without counsel. Rayes contacted three attorneys, but was unable to find someone

willing to represent him. In December 1989, he consequently informed the court that he would represent himself. Twice before trial, Rayes requested substitute counsel; he was refused both times.

After receiving various continuances, Rayes proceeded to trial, pro se, in September 1990. The jury found in favor of the defendants, and the district court denied a motion to set aside the verdict. Rayes filed his notice of appeal, and we appointed counsel for the appeal.

Rayes' only argument on appeal is that he was improperly denied substitute counsel. He alleges that the district court abused its discretion and that the denial violated his "Fifth Amendment due process right to a fair trial."

The State of Nebraska argues that the district court did not abuse its discretion, that there is no constitutional or statutory right to court-appointed counsel in a civil action, and that Rayes' case was not prejudiced by his lack of counsel. The State contends that Rayes "fired" Boggy, and that under such circumstances, substitute counsel should not be permitted.

The State correctly asserts that indigent litigants should not be permitted to "shop around" for appointed counsel or to discharge such counsel merely to accommodate a "preference" for another attorney.

At trial, Rayes twice stated that he "fired"[1] Boggy and that this occurred because of "several disagreements" between the two. In his affidavit, Boggy stated

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[1] Rayes stated:

> I fired him 31 days before the pretrial conference because within 30 days of the pretrial conference you

that their "differences cannot be resolved" and that Rayes has no "confidence in [Boggy] and the manner in which the case is being handled. . . . " Boggy's characterization of the situation is supported by Rayes' January 1990 filing with the district court in which Rayes stated that Boggy "did not obtain *pertinate* [sic] discovery papers held by Nebraska Correctional Services . . . nor did he take depositions from Plaintiffs wittness [sic]." (Emphasis in original).

The affidavit and the court filing support the conclusion that Boggy's withdrawal resulted from serious and apparently irreconcilable differences between attorney and client about how the case should be handled. In any event, the district court made no finding that Rayes simply "fired" Boggy, and we are unwilling to adopt such a conclusion based on the record before us. Boggy's withdrawal came on his own motion.

The issue before us is simply whether the district court abused its discretion by failing to grant Rayes' requests for a new attorney. Although a civil litigant has no constitutional or statutory right to a court-appointed attorney, *Wiggins v. Sargent*, 753 F.2d 663, 668 (8th Cir. 1985), the district court may make such an appointment

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cannot, according to their local rules here, introduce any more evidence.

Later, during an argument to the court, Rayes stated: "Mr. Bogey, [sic] who was . . . representing me at the time and has been fired by myself because of several disagreements. . . . "

at its discretion. *Id. See also* 28 U.S.C. § 1915(d) (1988).[2] The district court may also appoint substitute counsel when the circumstances so warrant. *Lewis v. Lane,* 816 F.2d 1165, 1169 (7th Cir. 1987).

In *In re Lane,* 801 F.2d 1040 (8th Cir. 1986), we identified the factors that the district court must consider when faced with a request for court-appointed counsel. The appointment of counsel " 'should be given serious consideration . . . if the plaintiff has not alleged a frivolous or malicious claim' " and the pleadings state a prima facie case. *Id.* at 1043 (quoting *Nelson v. Redfield Lithograph Printing,* 728 F.2d 1003, 1005 (8th Cir. 1984)). The court must also ascertain the plaintiff's need for an attorney and his inability to obtain counsel on his own. *Id.* The inquiry regarding the plaintiff's need should focus on several factors, including the likelihood that the plaintiff and the court will benefit from the assistance of counsel, the factual complexity of the case, the plaintiff's ability to investigate the facts and present his claim, the existence of conflicting testimony, and the complexity of the legal issues. *Id.* at 1043-44 (citing *Redfield Lithograph Printing,* 728 F.2d at 1005, and *Johnson v. Williams,* 788 F.2d 1319, 1322-23 (8th Cir. 1986)). These factors do not comprise an exclusive checklist. *Id.* at 1044. *See also Sours v. Norris,* 782 F.2d 106, 107 (8th Cir. 1986) (per curiam) (discussion of

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[2] Section 1915, which governs in forma pauperis proceedings, states in subsection (d):

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

factors); *White v. Walsh*, 649 F.2d 560, 563 (8th Cir. 1981) (same).

After reviewing the record in light of these factors, we conclude that the district court abused its discretion in failing to appoint substitute counsel. *See Johnson*, 788 F.2d at 1323 (district court abused discretion by failing to appoint counsel when circumstances warranted appointment); *Wiggins*, 753 F.2d at 668 (same). The circumstances present here demonstrate that the appointment of counsel was critical not only to Rayes' efforts to press his claims, but also to the jury's and the court's ability to fairly determine those claims.

Although Rayes had great difficulty articulating his claims pro se, it is evident that his claims were not frivolous or malicious. After Boggy filed a first and second amended complaint, the defendants made no motion to dismiss. At trial, the district court twice denied the defendants' motions for directed verdicts as to four of the six defendants. We therefore see no basis for concluding that Rayes' claims were frivolous or malicious, *see Denton v. Hernandez*, 112 S. Ct. 1728, 1733-34 (1992), or that he failed to state a prima facie case. The district court initially recognized the desirability of appointing counsel in this case after Rayes' pro se efforts at pleading ran aground on the shoals created by the requirements of pleading a constitutional violation. After withdrawal of the appointed counsel and Rayes' request for a successor, the court on two occasions, without explanation that appears in the record, denied the request. The court's earlier determination that counsel was necessary raises a strong question about these later refusals.

The record clearly substantiates the district court's initial observation that the appointment of counsel would be helpful. Following Boggy's appointment, the court received a properly drafted amended complaint and a second amended complaint. Boggy also conducted discovery. Following Boggy's withdrawal, however, Rayes was once again severely hampered in his ability to press his claims. As an inmate in the prison's "adjustment center," Rayes was not allowed to use a typewriter, computer, telephone,[3] or photocopying machine. He also was forbidden access to the prison's law library and could obtain legal materials only by written requests that often took several days or longer to fulfill.

Rayes was severely disadvantaged in his efforts to conduct discovery. When he filed his request for access to prison files still held by Boggy, the magistrate summarily denied the request because it was "not a proper motion under Rule 37, Fed. R. Civ. P." Rayes eventually obtained the files, but not until 18 days before the scheduled pretrial conference (which was later postponed).

Rayes also sought "shakedown reports" – pink slips given to a prisoner stating what contraband had been removed from a prisoner's cell during a "shakedown" – but apparently believed that he was prevented from obtaining them by Neb. Rev. Stat. § 83-178(2) (1987), which restricts inmates' access to files maintained by correctional agencies. Rayes contended that the pink slips

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[3] One exception existed to the general prohibition on telephone calls to attorneys: Rayes could use the phone to contact a lawyer who was already representing him in an action in which an appearance was scheduled within two weeks.

would verify that finger splints were confiscated from his cell. At one time Rayes allegedly possessed the pink slips, but he claimed they were removed during subsequent "shakedowns." The State of Nebraska stated that it no longer had any record of what was taken during these shakedowns and that any contraband removed from Rayes' cell would have been stored in a property box. It cannot be discerned from the record whether Rayes ever got access to this box. On the first day of trial, the State's attorney stated that she believed the box had been turned over that morning to the plaintiff. Rayes stated, however, that at the arranged time, "the property control man wasn't there" and that he would "supposedly" get the box when he returned to the prison. Nothing appears in the transcript regarding whether the box was finally turned over to Rayes or the outcome of his search.

At trial, Rayes examined and cross-examined witnesses, but failed to offer any testimony or other evidence against two of the named defendants. Rayes had alleged in his pretrial pleadings that these two guards had confiscated his finger splints. Because he offered no evidence against them, the district court dismissed them from the case.

It is apparent from the record that the demands of self-representation exceeded Rayes' abilities. Lacking ready access to a law library, unclear about his right to obtain certain records, and hampered by the restraints of the institution as well as by his own lack of legal knowledge, Rayes was ill-equipped to litigate his claims. The factual and legal issues were sufficiently complex that Rayes, in his pro se complaints, could not articulate a proper claim. The case also featured sharply conflicting

testimony. The guards denied intentionally slamming the door on Rayes' hand or even accidentally shutting the door on it. The medical personnel testified that Rayes was treated promptly for his injuries and that his missing splints were replaced.

In essence, the case hinged on determinations of witness credibility, and Rayes' lack of courtroom skills prevented the adequate examination of witnesses. For example, Rayes quickly abandoned his cross-examination of one of the guards who allegedly slammed the door, stating: "There is no way I can make you remember [the incident]. No further questions of this witness, Your Honor."

We are satisfied that Rayes alleged a colorable claim and that the circumstances of his confinement and his own lack of legal knowledge prevented him from adequately investigating and presenting his claims. The difficulties Rayes encountered at trial but confirm that he was totally inadequate to try a case that possessed some complexity and which was not frivolous. The appointment of substitute counsel would have been of benefit to the court and the plaintiff. We also observe that Rayes demonstrated his inability to retain an attorney. *See Nelson*, 728 F.2d at 1005 (court should satisfy itself that plaintiff has attempted to retain counsel and has been unsuccessful). After Boggy withdrew, Rayes wrote letters to three attorneys requesting representation. All three turned him down.

The district court may have had reason to deny Rayes' request for subsequent counsel, but no explanation appears in the record. The request was summarily

denied twice. In *Slaughter v. City of Maplewood*, 731 F.2d 587 (8th Cir. 1984), we emphasized that the district court must state reasons so that we can determine whether it exercised "a reasoned and well-informed judgment" regarding the request for court-appointed counsel. *Id.* at 589.

Under the totality of these circumstances, we conclude that the district court abused its discretion in denying Rayes' requests for substitute counsel. We therefore reverse and remand with directions to appoint counsel and grant a new trial.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD RAYES, Plaintiff, vs. MARK JOHNSON; STEVEN J. SIMONS; MELVIN ROUF; ANGELO S. VINCI; WILLIAM FAIRBANKS; DR. JOHN DOE; DR. DAN DANAHER, Defendants.	)	CV87-L-94 JUDGMENT (Filed Sep. 28, 1990)

This action came on for trial before the court and a jury, The Honorable Bruce M. Van Sickle, Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing; that the action is dismissed on the merits with prejudice, and that the defendants recover of the plaintiff, Richard Rayes, taxable costs of this action with interest thereon at the rate of 7.78 percent per annum as provided by law.

Dated at Lincoln, Nebraska, this 28th day of September, 1990.

NORBERT H. EBEL
Clerk of the Court

By /s/ Carol A. Reitz
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD RAYES, Plaintiff,	)	CV87-L-94
vs.	)	MEMORANDUM AND ORDER ON APPEAL FROM ORDER OF MAGISTRATE (Filed Feb. 2, 1990)
SGT. JOHNSON, et al., Defendants.	)	

Filing 62 is a request that there be a delay in the pretrial conference, that there be an appointment of an attorney, that barring the appointment of an attorney, the plaintiff receive a copy of "the file [maintained] to date of withdraw (sic)."

The plaintiff does not state the reason for wanting a continuance of the pretrial conference, but I assume it is that he wants to find someway to get more discovery accomplished. I am not inclined to grant more time. The case has been pending for almost three years. During that time the plaintiff has represented himself part of the time and he has been represented by counsel part of the time. Enough time has gone by to insist that he come to grips with the fact that the trial is imminent.

It is true, of course, that whatever information his counsel developed during his representation of the plaintiff should be furnished to the plaintiff.

IT IS ORDERED that:

1. the pretrial conference shall remain scheduled for February 20, 1990, at 9:00 a.m. at a

place to be designated by the administration of the Nebraska State Penitentiary;

2. that trial is to remain scheduled for the March 1990 jury term of this court;

3. that the previous counsel for the plaintiff, S. Nicholas Boggy, Military Colonial Building, 340 East Military, Fremont, Nebraska 68025, shall furnish promptly to the plaintiff whatever information and documents he has that will assist the plaintiff in the presentation of his case; and

4. the request for appointment of counsel is denied.

Dated February 2, 1990.

BY THE COURT

/s/ Illegible
United States
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Richard Rayes	)	Case No.
	)	87-L-94
vs	)	Appeal of Order
Mark Johnson, et al.	)	(Filed Jan. 19, 1990)

Now come the Plaintiff Richard Rayes pro se move this Court to:

(1) One delay the pretrial conference: reason Plaintiff court appointed attorney did not obtain *pertinent* discovery papers held by Nebraska Correctional Services (hereafter NCS) nor did he take depositions from Plaintiffs witness. Due to the rule governing when items submitted to the Court impose a time limit of 30 prior to the pretrial conference.

(2) appointment of attorney: the attorney previously withdrawn still even if he was working gratus should have been obligated by professionalizing to obtain those evidence name above.

(3) barring appointment of counsel plaintiff requests a copy of the file maintained to date of withdraw of the entitled case.

Prayer

(4) Plaintiff is aware that the state (representing the defendants) would object to plaintiff reviewing his own file and what evidence is thus far been obtain under laws

they know far better than the plaintiff meager education none of which is legalize and it's complicated working.

(5) A I therefore request that the pretrial be postponed.

B A local attorney assigned to CV 87-L-94 or in my attempt to locate an attorney who would take this case (unsuccessfully) It is my understanding that: Civil Clinic Law Program, University of Nebraska College of Law; Room 172, Lincoln NE 68583-0902 (402) 472-7211 will accept representation in civil matters upon appointment by judicial court. Perhaps this could be a compromise I personally only objective is to have adequate representation and evidence favorable to the Plaintiff be submitted to the courts review.

Respectfully submitted,

Richard Rayes
PO Box 2500-33647
Lincoln, Neb. 68502

Jan. 16, 1989
Richard Rayes
PO Box 2500-33647
Lincoln, Neb. 68502

Certificate of Service

I duly sworn under penalty of perjury say I sent an exact copy of this Motion of Appeal to Robert M. Spire Attorney General for Nebraska via 1st class mail to his office at 2115 State Capital, Lincoln, Neb. 68509-4906.

Dated this 16th of Jan. 1990.

Richard Rayes
RICHARD RAYES

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD RAYES,	)	CV87-L-94
Plaintiff,	)	ORDER
v.	)	(Filed Dec. 21, 1989)
MARK JOHNSON, et al.,	)	
Defendants.	)	

On the court's own motion, upon being advised that plaintiff will proceed pro se,

IT IS ORDERED:

1. Trial is continued to the March 1990 jury term of this court.

2. A pretrial conference will be held with the undersigned magistrate, the plaintiff, and counsel for the defendants on February 20, 1990 at 9:00 a.m., at a place to be designated by the administration of the Nebraska State Penitentiary.

3. Plaintiff's request for discovery, filing 60, is not a proper motion under Rule 37, *Fed.R.Civ.P.*, and the local rules and is therefore denied.

Dated December 21, 1989.

BY THE COURT

/s/ David L. Piester
United States
Magistrate

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Richard Rayes	)	Case No.
	)	CV87-L-94
-vs-	)	Discovery Motion Order
Mark Johnson, et al.	)	(Filed Dec. 19, 1989)

Now come the Plaintiff having contacted no less than three different attorneys to take this case without positive results.

The Plaintiff Richard Rayes does hereby notify this Court that he will represent himself in this case, at this time.

Further I am requesting that Court instruct Mr. Nicholas Boggy to give to the Plaintiff all evidence notes any information pertaining to this above entitled case.

Dated this 15th day of December 1989.

Respectfully submitted,

Richard Rayes
RICHARD RAYES
PO Box 2500-33647
Lincoln, Neb. 68502

Certificate of Service

Duly sworn oath of Richard Rayes under penalty of perjury does say I've mailed a exact copy of this motion to the Attorney General of Nebraska, Robert M. Spire, at his office 2115 State Capital, Lincoln, Neb. 68509-4906 via 1st class US mail.

Dated this 15th day of December 1989.

Richard Rayes

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD RAYES,	)	CV87-L-94
Plaintiff,	)	ORDER
v.	)	(Filed Oct. 17, 1989)
MARK JOHNSON, et al.,	)	
Defendants.	)	

The plaintiff has informed the court by letter that he concurs in his attorney's motion to withdraw.

IT THEREFORE HEREBY IS ORDERED:

1. The motion to withdraw, filing #54 , is hereby granted, effective upon the filing of a certificate of service indicating that a copy of this order has been served upon the plaintiff in this case.

2. Plaintiff is hereby given 30 days from the date of this order in which to obtain the services of substitute counsel and have that attorney file an appearance in his behalf in this court, or alternatively, to inform the court, by pleading, that he will proceed without counsel. If neither an appearance by an attorney nor a statement of the plaintiff that he will proceed *pro se* is filed, this action will be subject to dismissal at the expiration of the thirty-day period.

3. Trial of this matter is hereby continued to the January 1990, jury term of this court. The pretrial conference will be scheduled by the court after it is determined

whether or not plaintiff will have counsel in accordance with the foregoing paragraph.

Dated October 17, 1989.

BY THE COURT

/s/ David L. Piester
United States
Magistrate

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD RAYES, Plaintiff vs. MARK JOHNSON; STEVEN J. SIMONS; MELVIN ROUF; ANGELO S. VINCI; WILLIAM FAIRBANKS; DR. JOHN DOE; DR. DAN DANAHER, Defendants	CIVIL 87-L-94 MOTION TO WITHDRAW (EX PARTE) (Filed Oct. 6, 1989)

Comes now S. Nicholas Boggy, court-appointed attorney for the Plaintiff herein, and moves the Court for an order allowing the undersigned to withdraw as attorney for Plaintiff herein and in support thereof refers the Court to the duly verified Affidavit filed concurrently herewith.

/s/ S. Nicholas Boggy
S. Nicholas Boggy
Attorney #15350
SIDNER, SVOBODA,
SCHILKE, THOMSEN,
HOLTORF & BOGGY
Military Colonial Building
340 East Military
Fremont, NE 68025
(402) 721-7111

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion to Withdraw and Affidavit was mailed by United States mailed, postage prepaid, to Richard Rayes, Plaintiff herein, P.O. Box 2500-33647, Lincoln, Nebraska 68502, on this 29th day of September, 1989.

/s/ S. Nicholas Boggy
S. Nicholas Boggy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD RAYES, Plaintiff vs. MARK JOHNSON; STEVEN J. SIMONS; MELVIN ROUF; ANGELO S. VINCI; WILLIAM FAIRBANKS; DR. JOHN DOE; DR. DAN DANAHER;	)	CIVIL 87-L-94 AFFIDAVIT
STATE OF NEBRASKA	)	
	) ss	
COUNTY OF DODGE	)	

S. Nicholas Boggy, being first duly sworn, deposes and states as follows:

1. That your Affiant is the court-appointed attorney for the Plaintiff herein, Richard Rayes.

2. That Mr. Rayes has delivered to this Court a "Motion for Reappointment of Counsel" in which he indicates dissatisfaction with the representation by your Affiant of his interests in this matter.

3. That your Affiant recently spoke by phone with Mr. Rayes to discuss our differences but it is apparent that such differences cannot be resolved.

4. As your Affiant does not wish to set forth in this Affidavit any reasons for these differences and in this Motion to Withdraw which could be, in any way, construed in such a manner as to prejudice Mr. Rayes' case, your Affiant simply states that the differences between your Affiant and Mr. Rayes are such that your Affiant believes that Mr. Rayes has no confidence in your Affiant and the manner in which the case is being handled and the attorney-client relationship has deteriorated to the point where your Affiant's withdrawal as attorney for Mr. Rayes is proper and necessary.

5. Your Affiant further states that if the Motion to Withdraw is granted and other counsel appointed for Mr. Rayes that your Affiant will cooperate fully with successor counsel in any way requested.

FURTHER AFFIANT SAYETH NOT.

/s/ S. Nicholas Boggy
S. Nicholas Boggy

SUBSCRIBED in my presence and sworn to before me this 29th day of September, 1989.

/s/ Colleen A. Braniff
Notary Public

GENERAL NOTARY-State of Nebraska
COLLEEN A. BRANIFF
My Comm. Exp. Sept. 6, 1992